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APPELLANT'S BRIEF

SUPREME COURT OF KENTUCKY

File No. 75-1150

74110

WENDELL HOWARD Appellant

versus

JACQUELINE GAYHEART LAFVING, and
BRANHAM AND BAKER COAL CO. Appellees

APPEAL FROM MAGOFFIN CIRCUIT COURT
HON. BEN MANN, JUDGE

BRIEF FOR APPELLANT

FILED

JAN 27 1976

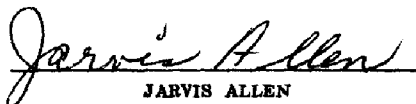
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SUPREME COURT certify that true copies of the within brief have been served on Appellees by mailing a copy to Hon. Walter S. Turner, Salyersville, Ky., Hon. J. K. Wells, Paintsville, Ky., their attorneys and upon the Circuit Judge by mailing a copy to Hon. Ben Mann, Judge, Magoffin Circuit Court, Salyersville, Ky., as required by RCA 1.250, this the 26th day of January, 1976.



JARVIS ALLEN

Attorney for Appellant

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STATEMENT OF THE QUESTIONS PRESENTED

1. Was a trust created in favor of Appellant when his property was traded for an undivided interest in coal and title taken in name of Appellee without the consent of infants Appellant under KRS 371.170?

2. Did CR 11.02 authorize the court to dismiss the action on any other ground that failure to state a cause of action when no answer or other pleading had been filed denying the allegations of the Complaint?

3. Did the Court err in ruling that limitations had run against the action by virtue of KRS 413.120, KRS 413.030 or KRS 381.170?

4. Does a parol trust in land have to be in writing?

5. Does the Kentucky Mortmain Statute apply to this case?

SUPREME COURT OF KENTUCKY

File No. 75-1150

WENDELL HOWARD - - - - *Appellant*

v.

JACQUELINE GAYHEART LAFVING, and
BRANHAM AND BAKER COAL CO. - - *Appellees*

APPEAL FROM MAGOFFIN CIRCUIT COURT
HON. BEN MANN, JUDGE

BRIEF FOR APPELLANT

May it please the Court:

STATEMENT OF THE CASE

Appellant, Wendell Howard filed this action in the Magoffin Circuit Court on August 22, 1974 (TR 1). Appellant alleges that while his sister, Jacqueline Gayheart Lafving, is holding a $\frac{1}{3}$ interest in a seam of coal in trust for him which said coal was purchased with his property and placed in Appellee, Jacqueline Gayheart Lafving's name, without his consent. He being an infant, said deed was filed with the complaint as exhibit (A) and appears on pages 5 & 6 of the transcript. The above facts are not disputed as Appellees

filed no answer but filed a motion to dismiss (TR 8) in which they alleged:

1. The complaint fails to state a cause of action upon which relief may be granted.

2. That the relief demanded is barred by the Statute of Limitations KRS 413.120.

3. That the alleged trust is on interest in real estate and must be evidenced in writing.

4. That plaintiff's claim is barred by the provisions of the Kentucky Dead Man Statute.

The complaint with deed attached and motion comprise the entire pleadings as to Jacqueline Gayheart Lafving, and Wendell Howard. Branham and Baker Coal Company had made no defense until too late and their answer was stricken. The record will show that a hearing was held on the motion to dismiss in the absence of Appellant and his attorney, but it was conducted by the Attorney for Appellee, Jacqueline Gayheart Lafving and present and assisting was the Attorney for Defendant, Branham and Baker Coal Company (Order dismissing TR 48).

No action was taken contrary to the rights of the beneficiary under the trust by the trustee, Jacqueline Gayheart Lafving, until February 4, 1974 when a lease was executed to the Licking River Mining Corporation (TR 26) and shows that it was notarized on February 9, 1974 (TR 30). Although the lease filed shows that it had been signed by L. G. Hall for Licking River Coal Company, and had been signed on February 9, 1974, in Florida by Lessors. There is no date showing the executing by L. G. Hall and no notarization of

his signature (TR 30). The record in the County Clerk's Office in Magoffin County shows an instrument which was later completed.

The order dismissing is erroneous and contains findings not argued by the Defendants unless argued orally in the absence of Attorney for Appellant and on questions not properly before the court. The complaint did state a cause of action, and this appeal is from that erroneous order which was not delivered to the Attorney for Appellant until August 20, 1975. See docket sheet (TR 56).

ARGUMENT I

There Was a Trust Created in Favor of Appellant as Shown by Complaint When His Property Was Traded For an Undivided Interest in Coal, and the Title Taken in Appellee, Lafving's Name, Without Appellant's Consent, he Being an Infant. (KRS 381.170).

The facts in the complaint are not disputed and show that the above trust was created. The Grantors of the mineral will be available as witnesses as well as the mother and other members of the Appellant's family. The evidence will not only show that Appellant never consented to the property being placed in his sister's name, but will show that he never signed the Bill of Sale for the car transferring same to the grantors of the minerals.

Appellant being an infant could not legally have consented to the transaction. This being an undivided interest in a seam of coal with others owning the surface, he could not take possession nor could the trustee

until she joined with others leasing the mineral as her own in February 9, 1974. Appellee, Licking River Coal Company was informed of these claims before any mining was done (Complaint TR 1).

ARGUMENT II

CR 12.02, Authorizes a Motion to Dismiss on 7 Grounds: Only One of Which Was Stated in Appellant's Motion and That Was No. (6). Failure to State a Cause of Action and the Court Only Had Jurisdiction to Rule on That Ground no Answer Being Filed.

The Appellees did not file an answer in this case; but filed a motion to dismiss (TR 8) and although the motion stated "4" enumerated grounds for such dismissal, only one was permitted by CR 12.02 and that was the failure to state a cause of action. Appellant could have raised grounds 2, 3, & 4 by answer had they chose to file on a motion to dismiss (TR 8) and although the motion stated "4" enumerated grounds for such dismissal, only one was permitted by CR 12.02 and that was the failure to state a cause of action. Appellant could have raised grounds 2, 3, & 4 by answer had they chose to file an answer. The court erred in ruling on any question not properly pleaded, such as limitations. The court should have overruled the motion since the complaint did state a cause of action.

The courts have held that the court should not dismiss unless it appears the pleading party would not be entitled to relief under any state of facts which could be proved in support of his claim. *Perry v. Creech Coal Company*, D.C. Ky., 55 F. Supp. 998.

The Appellee, Lafving, has filed no pleading claiming ownership of this mineral in question and Appellant states that she will not do so. The only answer appellant's attorney has ever received from said Appellee is "No comment."

ARGUMENT III

Limitations Has Not Run in the Action Under KRS 413.030 or 413.120 as This is an Undivided Interest in a Single Seam of Coal With no One in Possession, and it is Not an Action to Recover Land. Limitation Has Not Barred Action on a Trust Created Under KRS 381.170.

A person or persons cannot claim unmined minerals by adverse possession because he does not have actual possession of the minerals so as to extend his adverse possession to unmined minerals, and furthermore, where person or persons claiming adverse possession to mineral had never mined minerals in the land in controversy, they could not hold minerals under the theory of adverse possession. *Hallowell v. Caldwell County*, 288 Ky. 89, 155 S. W. 2d 481.

In *Vorkes v. Dennison*, 300 Ky. 427, 189 S. W. 2d 269, the rule was stated:

"Where ownership of the surface and of the mineral has been severed, title to the minerals may be acquired by adverse possession provided there has been actual, open, notorious, continuous, and hostile possession of the minerals for the statutory limitation period. The owner of the surface estate or some other person, must have taken actual possession of the minerals by opening and operating mines for the statutory period."

Also, the rule of law pertaining to adverse possession of minerals is supported in *Letcher County Coal & Imp. Co. v. Marlowe*, Ky., 398 S. W. 2d 870 (1965). (Rehearing denied March 4, 1966.)

In discussing a trust created by KRS 381.170, in *Huff v. Byers*, 209 Ky. 375, 272 S. W. 897 (1925), this court held that a constructive trust was converted into an express trust against which the five (5) year statute of limitation would not run; therefore, using the same analogy as *Huff v. Byers*, "Supra", in the case at bar, the trust created by KRS 381.170 was converted into a subsisting or continuing trust, as stated in *Huff v. Byers*, "Supra". This being true, as long as appellee held the title, limitation did not run against the enforcement of the trust until the trust is repudiated or it's terms violated.

The general rule of law in Kentucky is that the statute of limitations does not begin to run against an oral trust in real estate until the trust is repudiated.

Furthermore, in *Weissinger v. Weissinger*, Ky., 302 S. W. 2d 97 (1957), the court held that where both parties are equally at fault in not bringing the controversy to a head, neither party can complain that the other is guilty of "laches", and the court went on to say that "laches" is more than delay; it is negligent delay that causes another to change his position to his detriment."

This is not an action to recover possession of land, therefore, KRS 413.020 does not apply.

ARGUMENT IV

A Parol Trust in Land Does Not Have to be in Writing.

In Kentucky, the state has never adopted the seventh section of the English Statute of Frauds prohibiting parol trusts in lands. *Wizard Inn. Co. v. York*, 167 Ky. 634, 181 S. W. 370 (1916).

Also, the Kentucky courts have held that a parol trust in real estate did not have to be evidenced by a written instrument in the following cases: *Anglin v. Powell*, 235 Ky. 705, 325 S. W. 2d 54 (1930); *Stiefvater v. Stiefvater*, 246 Ky. 646, 53 S. W. 2d 926 (1932); *Moore v. Terry*, 293 Ky. 727, 170 S. W. 2d 29 (1943). The later cases have substantiated the older cases by holding that a continuing trust in realty may be created by parol agreement made prior to or simultaneously with execution of conveyance, and such trust does not come within Statute of Frauds. *Weissinger v. Weissinger*, Ky., 302 S. W. 2d 97 (1957).

In *Evans v. Payne*, Ky., 258 S. W. 2d 919 (1953), the court held that a parol trust may be created even though deed is absolute on its face.

ARGUMENT V

The Kentucky Mortmain Statute Does Not Apply in This Case as the Decedent Made no Statement in the Deed as Recited by the Circuit Court.

The deed was executed by grantors who are available as witnesses to a grantee who is available. In addition to appellant, there are numerous witnesses to the transaction.

The evidence of the decedent, Mr. Howard, would not be necessary as the acts themselves prove what occurred with the most important witnesses being the grantor of the coal and purchaser of Appellant's car without his consent.

There is no declaration in the deed by decedent that would need to be impeached (TR 5).

CONCLUSION

The court having erred in conducting a hearing in the absence of Appellant or his Attorney and having considered matters not properly raised in the motion to dismiss and having erred in his ruling on the statutes of Limitations this court must reverse the Circuit Court and return this case to the Magoffin Circuit Court for trial on the merits.

Respectfully submitted,

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